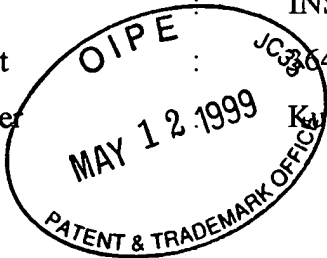


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IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS & INTERFERENCES

Appellant : Russell F. MIZELL, III
Serial No. : 08/654,600
Filed : May 29, 1996
For : INSECT ATTRACTION AND CAPTURE DEVICE
Art Unit : JC3643
Examiner : Kurt Rowan



BRIEF ON APPEAL

Hon. Commissioner of Patents & Trademarks
Washington, D. C. 20231

Sir:

The following Brief on Appeal is submitted in support of the appeal of the Office Action mailed November 19, 1998, wherein the Examiner finally rejected claims 2-4, 6 and 8-13. and objected to claims 5 and 7.

The Appeal Fee in the amount of \$ 150.00 is submitted herewith.

To the extent necessary, appellant petitions for an extension of time under 37 CFR §1.136. Please charge any fees due to Deposit Account No. 11-0610 (Docket No. 5383).

Respectfully submitted,

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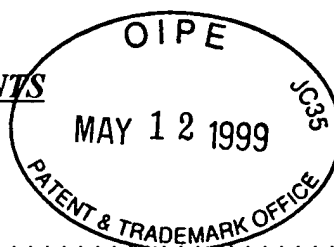
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REAL PARTY IN INTEREST

As evidenced by an Assignment dated June 13, 1996, which was recorded in the U.S. Patent and Trademark Office as of June 28, 1996, on Reel 8011 at Frame 0663, the real party in interest herein is the University of Florida.

RELATED APPEALS AND INTERFERENCES

There are no pending appeals or interferences which are related to the instant appeal.

STATUS OF CLAIMS

This is an appeal from the final rejection of claims 3, 4, 6, and 8-13. Original claims 1 and 2 have been cancelled. Claims 5 and 7 are not under final rejection, but are only objected to as being dependent upon a rejected base claim. The Examiner indicated in paragraph 3 of the final Office Action that claims 5 and 7 would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claim(s). Upon disposition of the present appeal, these claims will either be allowable in their present form should the Examiner be reversed, or will be put in allowable form by being rewritten in independent form should the Examiner be affirmed.

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STATUS OF AMENDMENTS

An Amendment Under 37 CFR §1.116 was submitted on February 12, 1999. In an Advisory Action mailed February 19, 1999, the Examiner indicated that the Amendment would be entered upon the filing of a Notice of Appeal and the submission of a Brief on Appeal, and stated that claims 5 and 7 were objected to and claims 3, 4, 6 and 8-13 were rejected.

SUMMARY OF INVENTION

The present invention relates to a novel device for capturing the noxious insect species, stinkbug [*Hemiptera: Pentatomidae* and *Coreidae*]. The device embodies a bottom portion particularly adapted to attract the stinkbug insects and, taking advantage of the natural movement of the walking or crawling insect, encourage their movement in an upward direction to the top of the device which is designed to permanently entrap the stinkbugs.

Referring to the drawings and, in particular, Figs. 1(a), 1(b) and 3, the bottom portion comprises at least two intersecting "fins" disposed in a vertical plane to define channels whose intersecting walls are triangular in shape and being wider at the base and narrower at the top. The bottom portion is of a color which reflects light having a wavelength that attracts the target stinkbug species.

The top portion of the device is an entrapping receptacle open only at an entrance opening which is positioned over the upper part of the bottom portion such that the channels defined by the intersecting fins terminate within the receptacle.

The stinkbug species is characterized by having a strong inclination to walk or crawl after flight. The intersecting fins of the claimed device cooperate to form channels which encourage the walking and/or crawling stinkbug species to migrate from the wider base portion to the narrower top portion which is surrounded by the trapping receptacle. If desired, an attractant, bait or pheromone for the stinkbug may be incorporated within the trapping chamber. The

orientation of the device and the natural movement of the stinkbug species are defined in detail in the specification at page 7, from line 12, to page 8, line 20.

Claim 13 defines the apparatus in its broadest embodiment.

Claims 3, 4 and 6 depend from claim 13 and define preferred embodiments of the “fins.”

Claim 5 defines an apparatus which is the most preferred embodiment of the invention, i.e., that wherein the planar fins are right triangles joined at the longest side which is not the hypotenuse such that the shortest sides of the triangle form the base at the bottom portion and the apexes opposite the shortest sides form the upper end of the bottom portion.

Claim 7 is specific to a preferred predominant color of the device for attracting stinkbugs.

Claim 8 is specific to a device of a certain height.

Claim 9 is specific to means for anchoring the apparatus to the ground.

Claim 10 is specific to a device wherein the top portion is of a color which reflects light having a wavelength which neither attracts nor repels the target insect species.

Claims 11 and 12 are specific to devices wherein the material of construction of the top portion is one which admits ambient exterior light into the interior of the chamber.

ISSUES ON APPEAL

Claims 3, 4, 6 and 8-13 stand finally rejected under 35 USC §103(a) as being unpatentable over Ruddell in view of Brown.

The issues thus presented for appeal are as follows:

- I. Whether the Examiner has made out a *prima facie* case of obviousness of the subject matter claimed in claims 3, 4, 6 and 8-13 based upon the combination of references to Ruddell and Brown.
- II. Assuming the establishment of a *prima facie* case of obviousness of the claimed invention over Ruddell and Brown, does the present record satisfactorily rebut the *prima facie* case of obviousness?

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GROUPING OF CLAIMS

As provided in 37 CFR §1.192(c)(5), appellant herein states that each of rejected claims 3, 4, 6, 8-10 and 13 stands alone, and appropriate arguments will be set forth hereinbelow as to why appellant considers each of the rejected claims to be separately patentable.

Appellant will concede that rejected claims 11 and 12 stand or fall together.

ARGUMENTS

The Examiner Has Not Made Out A
Prima Facie Case of Obviousness

With regard to the broadest claim (claim 13), the Examiner states, *inter alia*, that, “the patents to Ruddell and Brown show insect traps having a bottom portion with first and second fins and a top portion comprised of a receptacle.” With regard to the primary reference, Ruddell, the Examiner states, *inter alia*, that the reference:

“...shows a bottom portion 24 with fins 30, 31 and receptacle 1, 2 with openings 4, 5. The surface of the first and second fins forms a channel which is directly exposed to the environment in which the target species is present. Ruddell shows the fins on top of the receptacle in Fig. 1 but the top portion of the trap can be considered as the bottom and visa versa by merely inverting the drawing Figs. The first and second fins are wider at a base portion and narrower at a top portion which is located inside of receptacle 2.” [Emphasis added.] [Final Office Action, page 2, paragraph 2.]

Thus, the only way the Examiner can make the Ruddell reference “fit” is to turn the insect trap disclosed by Ruddell upside down. It strains credulity and flies in the face of reason to state that it would be obvious to one skilled in the art to turn a device disclosed by a reference to be suitable as a beetle trap upside down and conclude that the inverted device would be suitable as a stinkbug trap.

First, if the Ruddell trap is turned upside down, it will no longer function for its intended purpose disclosed by Ruddell as that of being a beetle trap. The Ruddell device will only

work as a beetle trap when positioned as shown in the drawing figures. Thus, note the disclosure at page 2, line 94, to page 3, line 5, wherein it is disclosed, *inter alia*, that:

“...beetles which are attracted to the trap by the smell of the bait and the colors of the bait receptacle and beetle container will strike the portions of the baffle which project upwardly and will drop into the conduit through which they will pass and into the beetle container. ... The force of the blow received when the beetles strike the baffles will cause them to be dazed and they will drop downwardly through the conduit into the beetle container.

...

“The fumes from the bait and the colors of the bait holder and beetle container will attract the beetles and cause them to fly towards the trap. When the beetles reach the trap, they strike the projecting upper portion of the baffle and are deflected downwardly so that they pass through the conduit and into the beetle container.” [Emphasis added.]

Thus, it should be apparent to those skilled in the art that the design of the Ruddell beetle trap and the entire thrust of the Ruddell disclosure is one of attracting flying beetles to the device whereupon they strike the baffles while in flight and are stunned or dazed and drop downwardly into the container. It should be obvious to those skilled in the art that inverting the Ruddell trap will give rise to a device that will not permit it to function as intended. Beetles flying towards the inverted device will strike the “fins” and simply drop to the ground and, upon becoming undazed, will simply fly away.

Attention is directed to the decision in *In re Gordon*, 221 USPQ 1125 (CAFC 1984), wherein a similar fact situation to that herein was presented. Appellant claimed a blood filter assembly comprising certain elements. The claims were rejected over a reference which disclosed the same device only if the prior art apparatus were turned “upside down.” As in the present fact situation, the prior art device, if turned upside down, would not function for the purpose for which it was designed. The Court held that the Board erred in concluding that the claimed device was *prima facie* obvious over the prior art device and stated, *inter alia*:

“The question is not whether a patentable distinction is created by viewing a prior art apparatus from one direction and a claimed apparatus from another, but, rather, whether it would have been obvious from a fair reading of the prior art reference as a whole to turn the prior art apparatus upside down. [The prior art reference] teaches a liquid strainer which relies, at least in part, upon the assistance of gravity to separate undesired dirt and water from gasoline and other light oils. Therefore, it is not seen that [the prior art reference] would have provided any motivation to one of ordinary skill in the art to employ [the prior art] apparatus in an upside down orientation. The mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification.” [citing *Carl Schenck, A.G. v. Nortron Corp.*, 218 USPQ 698, 702 (Fed. Cir. 1983); *In re Sernaker*, 217 USPQ 1, 6-7 (Fed. Cir. 1983); and *In re Imperato*, 179 USPQ 730, 732 (CCPA 1973)].

“Indeed, if the [prior art] apparatus were turned upside down, it would be rendered inoperable for its intended purpose.”

In the present fact situation, if the Ruddell apparatus were turned upside down, it would be inoperable for its intended purpose. Obviously, no one skilled in the art would be

motivated to invert the Ruddell apparatus for any reason since to do so would render it inoperable under the doctrine enunciated in *In re Gordon, supra*. Therefore, it is respectfully submitted that the Examiner has not made out a *prima facie* case of obviousness.

It is also noted that one skilled in the art would not be motivated to adapt the Ruddell device to arrive at the claimed apparatus since Ruddell is concerned with the trapping of beetles, whereas the present invention is concerned with the trapping of stinkbugs. Since these species of insects differ radically from each other in their flight patterns and behavior, one skilled in the art would not expect that a device designed specifically for beetles could be modified to be operable for the trapping of stinkbugs. Thus, note that the Ruddell device depends for its successful operation on the beetles "knocking themselves out" by flying into the fins of the trap and then dropping, dazed, into the lower container. Conversely, the claimed trap is designed to attract the stinkbugs so as to "land" on the fins and then walk or crawl in an upward direction into the top receptacle or container. Appellant is aware of no logical process whereby one skilled in the art would be motivated to alter the Ruddell device so as to operate in an entirely different fashion to attract and trap a different species of insect.

Moreover, the secondary reference to Brown (which will be discussed in detail hereinbelow) is specific to a device designed to trap flies. The Examiner would have the Board believe that it would be *prima facie* obvious to one skilled in the art to combine elements from one trap designed for beetles with elements from another trap designed for flies and arrive at a

device suitable for trapping stinkbugs. Add to this unlikely mix that it would be necessary to invert the device of the primary reference to arrive at the claimed device and one arrives at a scenario of *prima facie* obviousness that is staggeringly untenable.

It was pointed out to the Examiner in the Amendment filed February 12, 1999, that it was well settled in patent law that it is not open to an Examiner to combine non-analogous art to meet the limitations of a claimed invention, citing *In re Wood*, 202 USPQ 171, and *In re Oetiker*, 24 USPQ2d 1443. The Examiner responded to this argument via the Advisory Action mailed February 19, 1999, by stating, *inter alia*, that:

“The cited references are analogous art since they are both insect traps classified in the same subclass having similar structure.”

Obviously, this statement is not a refutation of appellant's argument. The mere fact that the references disclose insect traps does not mean that they are “analogous art.” They would be analogous art only if they were concerned with the trapping of at least insects with the same flying patterns and behavior as those intended to be captured by the claimed device. Ruddell traps flying beetles with a device that functions by stunning the beetles in flight, whereas the Brown device captures flies by luring them into a container with a bait material which will ultimately result in their contacting a fluid insecticide. The claimed device, on the other hand, depends for its function upon attracting stinkbugs to the device whereupon they land on the device and walk or crawl upwardly into a container wherein they are trapped. It should be readily apparent to those skilled

in the art that these three devices are from non-analogous art areas since each is related to the trapping of a different insect and each employs device elements which attract and trap the insects in different ways.

Accordingly, under the doctrine of the decisions in *In re Wood, supra*, and *In re Oetiker, supra*, a *prima facie* case of obviousness cannot be based on combining elements from non-analogous art areas in a manner that reconstructs an invention only with the benefit of hindsight.

In the final Office Action at page 3, the Examiner addressed the fact that Ruddell and Brown targeted beetles and flies, respectively, whereas the claimed device targets stinkbugs. The Examiner merely stated, *inter alia*, that:

“...the target species is a matter of choice and it would have been obvious to target stinkbugs or any other desired pest for capture.”

How could it be obvious to target stinkbugs utilizing a device designed to entrap beetles; how could it be obvious to target stinkbugs with a device designed to kill flies? There is no prior art of record and the Examiner has presented no evidence to demonstrate that those skilled in the art would recognize that beetles, flies and stinkbugs are interchangeable as target species when designing insect traps. The Examiner might just as well say that either the Ruddell device or the Brown device would be amenable to entrapping or killing every conceivable type of insect,

regardless of its manner of locomotion or behavior by simply stating that, “target species is a matter of choice.”

Brown is apparently combined with Ruddell because the latter does not show a receptacle having only a single entrance opening. The Examiner is apparently of the opinion that he need only cite a reference which discloses an insect trap having an insect receptacle with a single opening and that he can combine this with a reference that otherwise meets the limitations of the claims (albeit by turning the prior art device “upside down”), notwithstanding that there is no motivation whatsoever to combine the receptacle design of the secondary reference with Ruddell. Indeed, why would one skilled in the art even think of combining elements from a fly trap with one from a beetle trap to arrive at a trap for stinkbugs? The very statement of the proposition underscores the ludicrousness of any such position.

It is only by using appellant’s own teachings and relying upon impermissible hindsight that one versed in the art would have been led to even contemplate combining the teachings of Ruddell and Brown. Moreover, it is impermissible to use the claimed invention as an instruction manual or “template” to piece together isolated disclosures and teachings of the prior art so that the claimed invention is rendered obvious. A rejection based on 35 USC §103 must rest on a factual basis with the facts being interpreted without hindsight reconstruction of the invention from the prior art. Here, the Examiner has not borne the initial duty of supplying a factual basis for the rejection advanced. The Examiner apparently doubts that the invention is patentable and

resorts to speculation, unfounded assumptions and hindsight reconstruction to supply the deficiencies in the factual basis necessary for the establishment of *prima facie* obviousness.

The claimed stinkbug trap depends for its operation and function on the tropism of flying insects which walk or crawl after flight. Thus, the channels defined by the fins of the claimed device are designed to encourage the natural movement of the walking or crawling insect at an upward direction where they become entrapped in the enclosed chamber. See the specification at page 4, first full paragraph, and the paragraph bridging pages 6 and 7. Thus, it is not seen how a reference which depends upon a physical blow to “daze” or “stun” a target beetle can be combined with a reference which depends upon a gaseous effluent to lure a fly down into a container to render *prima facie* obvious a device which depends upon channeling a walking or crawling insect in an upward direction to become entrapped in a chamber which covers the top of the channels. There is simply no logical line running through these references which would suggest their being combined in this manner, other than the Examiner’s hindsight reconstruction of appellant’s invention utilizing appellant’s own disclosure.

The Claims Do Not Stand Or Fall Together

Claim 3 is separately patentable in that it defines the fins as triangular in shape. The Examiner states at page 3 of the final Office Action that, “Ruddell shows triangular fins”; however, an examination of the Ruddell reference will reveal that the fins 30, 31 referred to by the Examiner as corresponding to those of the claimed device are not triangular in shape, but

rather are pentagonal. The Examiner cited no prior art or relied upon any evidence of record which suggests that triangular and pentagonal fins are equivalent.

Claim 4 is separately patentable in that it recites certain angle sizes in the triangular fins. The Examiner states at page 3 of the final Office Action that Ruddell shows the angles between the fins as 90° , "but it would have been obvious to employ other angles such as in the range of $60-80^\circ$ since the function is the same and no showing of unexpected results was made." First, as noted above, Ruddell does not disclose triangular fins. Moreover, the Examiner does not state why it would be "obvious to employ other angles" since the function is most certainly not the same between the two devices. Thus, as noted above, the fins of the Ruddell trap are designed to stun or knock out the flying beetles, whereas those in the claimed device are designed to attract the stinkbugs and direct their walking or crawling in an upward direction. Thus, the "angles" of the fins are of primary importance since the function is most definitely not the same respectively.

Claim 6 is separately patentable since Ruddell does not, as stated by the Examiner, disclose "four triangular fins." As noted above, the fins of Ruddell are pentagonal and not triangular in shape. Moreover, since, as noted above, they do not function in the same manner, it cannot be stated that it would be obvious to modify the four fins of Ruddell to be triangular in shape as opposed to pentagonal in shape.

Claim 8 is separately patentable since the Examiner has cited no prior art or presented any evidence which would render a device having a bottom portion with a height of from 30-120 cm obvious. The Examiner addresses this distinction by merely stating that, "exact size is a matter of design choice to be determined by routine experimentation." However, the references relied upon by the Examiner are designed for the trapping of insects of a different species than those for which the claimed device is designed. The Examiner has relied on no prior art nor presented any evidence of record which would make it obvious to one skilled in the art that a device having a bottom portion having the height parameters of claim 8 would be particularly advantageous for trapping stinkbugs.

Claim 9 is separately patentable since the Examiner has presented no evidence or relied upon any prior art which would demonstrate that it would be obvious to one skilled in the art to provide the "base of the bottom portion" with means for anchoring the apparatus to the ground. The Examiner merely states at page 3 of the final Office Action that Ruddell "shows means 28 to anchor the apparatus to the ground." It should be noted, however, that means 28 are not designed to anchor the apparatus to the ground, but rather are openings for entry of fumes into the conduit for the purpose of suffocating beetles as they pass inwardly. Indeed, it is apparent from the disclosure at lines 20-40 and 120-130 on page 2 of Ruddell that the device is not designed to be anchored to the ground, but rather is designed for being suspended from an overhead support.

Claim 10 is separately patentable since, as admitted by the Examiner, Ruddell shows that the exterior surfaces of the receptacle comprising the top portion are colored to reflect light having a wavelength which attracts insects, whereas claim 10 is directed to one wherein the top portion is of a color which reflects light having a wavelength which neither attracts nor repels the target insect species. Thus, Ruddell actually teaches away from the claimed invention. The Examiner apparently relies on Brown as disclosing a clear receptacle which "appears" to neither attract nor repel target species; however, the reference is silent on this point.

It is noted that the Examiner apparently views Ruddell in its appropriate right-side-up configuration when rejecting one set of claims, and as upside down or inverted when rejecting other sets of claims. It is respectfully submitted that the Examiner cannot have it both ways; it is illogical to view the device in different orientations merely for the purpose of rejecting the claims. Such logic clearly relies upon a hindsight reconstruction of the claimed device from the references.

Claims 11 and 12 are separately patentable since the only reference relied upon by the Examiner showing a top portion which admits ambient light into the interior chamber is Brown which is designed to trap flies, whereas the claimed device is intended for the trapping of stinkbugs. One skilled in the art would not be led to utilize a device known for trapping flies to also entrap stinkbugs.

Refutation Of Prima Facie Case Of Obviousness

Even in the unlikely event that the Board concludes that the Examiner has made out a *prima facie* case of obviousness, the specification is replete with evidence which rebuts any such presumption. As noted in the specification at pages 1 and 2, no prior art traps or methods exist for eradicating stinkbugs other than the use of harsh and environmentally toxic pesticides. This is underscored by the fact that the Examiner has cited no prior art which discloses any such method or trap for controlling the population of stinkbugs. From page 9 through page 16 of the subject specification, the device of the present invention is compared with the prior art Tedders trap [*J. Entomol. Sci.*, Vol. 29, pages 18-30 (1994)] which is of a similar design. The disclosure sets forth that the device of the claimed invention functioned much better than the Tedders trap for stinkbugs, thereby vitiating any *prima facie* case of obviousness set forth by the Examiner.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that the final rejection should be reversed and the application remanded to the Examiner for immediate allowance.

Respectfully submitted,

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APPENDIX

Claims On Appeal

13. An apparatus for capturing target insect species comprising stinkbugs comprising:

a bottom portion for attracting the target insect species and for directing said target insect species toward and into a top portion for the capture thereof;

said bottom portion comprising at least a first and a second fin, said first fin being disposed in a first substantially vertical plane and said second fin being disposed in a second substantially vertical plane, said first and second fins extending radially outwardly from a common longitudinal axis defined by a line of intersection of said first and second substantially vertical planes;

a surface of said first fin and a surface of said second fin defining opposing channel surfaces of an outwardly facing channel, said channel surfaces having portions which are directly exposed to an environment in which said target species is present, whereby said directly exposed portions may be seen by members of said target species from positions beyond a perimeter of said apparatus;

each of said first and second fins being wider at a base portion thereof and narrower at a top portion thereof, whereby said channel defined by said surfaces of said first and second fins narrows from said wider base portions to said narrower top portions; said bottom

portion being predominantly of a color which reflects light having a wavelength which attracts the target insect species;

said top portion of said apparatus comprising a receptacle, said receptacle being open only at an entrance opening, and wherein said entrance opening is positioned at, and substantially surrounds, an upper part of said bottom portion, whereby said channel formed by said first and said second fins terminates within said receptacle.

3. The apparatus of claim 13 wherein said fins are triangular in shape.

4. The apparatus of claim 3 wherein the angles of said fins opposite the longitudinal axis measure between about 60° and 80° .

5. The apparatus of claim 3 wherein said planar fins are essentially right triangles joined at the longest side which is not the hypotenuse such that the shortest sides form the base of the bottom portion of the apparatus and the apexes opposite said shortest sides form the upper end of said bottom portion.

6. The apparatus of claim 3 having four triangular fins.

7. The apparatus of claim 13 wherein said predominant color is one which reflects about 15% of the incident light in a wavelength of from about 300 nm to about 500 nm and about 55-70% of the incident light in a wavelength of from about 500 nm to about 750 nm.

8. The apparatus of claim 13 wherein said bottom portion has a height of from about 30 to about 120 cm.

9. The apparatus of claim 13 wherein the base of said bottom portion contains means for anchoring said apparatus to the ground.

10. The apparatus of claim 13 wherein interior and exterior surfaces of said receptacle comprising said top portion are predominantly of a color which reflects light having a wavelength which neither attracts nor repels the target insect species.

11. The apparatus of claim 13 wherein said top portion comprises a material of construction which admits ambient exterior light into the interior of said chamber and onto said channel surface of said at least one channel.

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12. The apparatus of claim 11 wherein said material of construction is screening which is impervious to the passage therethrough of the target insect species.